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Supreme Court of United States

MASSACHUSETTS, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The D.C. Circuit

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BRIEF OF THE CATO INSTITUE AND LAW PROFESSORS JONATHAN H. ADLER, JAMES L. HUFFMAN, AND ANDREW P. MORRISS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. PETITIONERS HAVE NOT SATISFIED THE REQUIREMENTS OF ARTICLE III STANDING. 4

A. Petitioners' Concerns About Global Warming Present Generalized Grievances Not Fit For Judicial Resolution 7

B. Petitioners Have Not Suffered Any Injury-in-Fact That Is Both Actual Or Imminent *And* Concrete And Particularized 9

C. Petitioners' Alleged Injuries Are Not Redressable By A Favorable Ruling From This Or Any Other Court 12

D. The Alternative Theories Of Standing Put Forward By State *Amici* Are Equally Unavailing 14

II. CONGRESS DID NOT DELEGATE AUTHORITY TO REGULATE GREENHOUSE GAS EMISSIONS TO THE EPA 17

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. Wright,
468 U.S. 737 (1984) ..... *passim*
AT&T Corp. v. Iowa Public Utilities Bd.,
525 U.S. 366 (1999) 18
Babbitt v. United Farm Workers,
442 U.S. 289 (1979) 9
Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988) 17
Bowsher v. Synar,
478 U.S. 714 (1986) 5
Buckley v. Valeo,
424 U.S. 1 (1976) 4
Cargo of the Brig Aurora v. United States,
11 U.S. (7 Cranch) 382 (1813) 18
Chevron USA, Inc. v. Natural Resources Defense Council,
467 U.S. 837 (1984) 20
City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 10
Clinton v. New York,
524 U.S. 417 (1998) 5
DaimlerChrysler Corp. v. Cuno,
126 S. Ct. 1854 (2006) ..... *passim*
FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) ..... *passim*
Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.
528 U.S. 167 (2000) 11
Frothingham v. Mellon,
262 U.S. 447 (1923) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Gladstone, Realtors v. Village of Bellwood,
441 U.S. 91 (1979) 9
Industrial Union Dept., AFL-CIO v. American Petroleum Institute,
448 U.S. 607 (1980) 18, 19
Loving v. United States,
517 U.S. 748 (1996) 18
Ludecke v. Watkins,
335 U.S. 160 (1948) 18
Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) ..... *passim*
Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 9
Massachusetts v. EPA,
415 F.3d 50 (D.C. Cir. 2005) 11, 13
Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.,
501 U.S. 252 (1991) 4
National Cable Television Ass'n v. United States,
415 U.S. 336 (1974) 18
Raines v. Byrd,
521 U.S. 811 (1997) 7
Rapanos v. United States,
126 S. Ct. 2208 (2006) 12
Schlesinger v. Reservists Comm. to Stop the War,
418 U.S. 208 (1974) 5
Sierra Club v. Morton,
405 U.S. 727 (1972) 7
Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 6, 13
Train v. Natural Resources Defense Council,
421 U.S. 60 (1975) 23

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Lopez,
514 U.S. 549 (1995) 5
United States v. Richardson,
418 U.S. 166 (1974) 6, 7, 8
Valley Forge Christian College v. Americans United for Separation of Church & State,
454 U.S. 464 (1982) 8
Whitman v. American Trucking Ass'n, Inc.,
531 U.S. 457 (2001) 23
Whitmore v. Arkansas,
495 U.S. 149 (1990) ..... *passim*

STATUTES AND CONSTITUTIONS

42 U.S.C. § 7507 ..... 16, 17
42 U.S.C. § 7521(a) 14, 15, 23
42 U.S.C. § 7543(a) 16
Energy Policy Conservation Act,
49 U.S.C. §§ 32901-32919 16
National Climate Program Act of 1978,
Pub. L. No. 95-367, 92 Stat. 601 (1978) 21
Pub. L. No. 105-276, 112 Stat. 2461 (1998) 22
Pub. L. No. 106-74, 113 Stat. 1047 (1999) 22
Pub. L. No. 106-377, 114 Stat. 1441 (2000) 22
U.S. Const. art. I, § 1 17

OTHER AUTHORITIES

4 *Papers of John Marshall* (C. Cullen ed., 1984) 5

TABLE OF AUTHORITIES
(continued)

Page(s)

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Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986) 24
Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922, 59926-27 (Sept. 8, 2003) 21, 23
Declaration of M. MacCracken 14
Declaration of Michael P. Walsh 13
Marci A. Hamilton, *Representation and Non-Delegation: Back to Basics*, 20 Cardozo L. Rev. 807 (1999) 19
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James Madison, 2 *Records of the Federal Convention of 1787* (M. Farrand ed., 1966) 9
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TABLE OF AUTHORITIES
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Arnold W. Reitze, Jr., *Air Pollution Control Law: Compliance & Enforcement* (2001) 22, 23
John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219 (1993) 7, 9
Antonin Scalia, *How Democracy Swept the World*, Wall St. J., Sept. 7, 1999 19
David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993) 19
Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000) 18
T.M.L. Wigley, *The Kyoto Protocol: C02, CH4, and Climate Implications*, 25 Geophysical Research Letters 2285 (1998) 14

BRIEF OF THE CATO INSTITUTE AND LAW PROFESSORS JONATHAN H. ADLER, JAMES L. HUFFMAN, AND ANDREW P. MORRISS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional studies was established in 1989 to help restore the principles of limited constitutional government, including the idea the U.S. Constitution separates power among three coordinate branches of the federal government in order to preserve citizens' liberty, and that the government's role in private economic affairs is necessarily limited. Toward that end, the Institute and the Center undertake a wide range of publications and programs, including the *Cato Supreme Court Review*. The instant case directly concerns the separation of powers and the role of the courts in formulating national economic and environmental policy, and threatens to dramatically expand the role of the federal government in regulation of the U.S. economy. It is therefore of central interest to the Cato Institute and its Center for Constitutional Studies.

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[1] Pursuant Supreme Court Rule 37.6, *amici* state that all parties have consented to the filing of this brief, that no counsel for a party authored this brief in whole or in part, and that no persons or entities other than *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

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The views expressed herein are those of the Cato Institute and the individual law professor *amici*. These views do not necessarily represent the views of *amici* law professors' employers or any other group or organization with which they may be affiliated.

SUMMARY OF ARGUMENT

Climate change is a serious public policy issue. So-called "global warming" may well be the greatest environmental concern of the twenty-first century. The significance of anthropogenic contributions to climatic warming does not, however, mean that courts should—or even have the jurisdiction to—consider legal claims that seek to direct U.S. policy on the subject. Current claims of injury from global warming are quintessential generalized grievances that courts are not competent to address. However serious or urgent the threat of climate change may be, such concerns are best resolved through the political process. To thrust them upon the courts, absent the direction (let alone acquiescence) of the political branches, undermines both the separation of powers and the democratic legitimacy of climate change policy.

In this case, petitioners are asking this Court to force the Environmental Protection Agency (EPA) to impose nationwide regulations on greenhouse gases, the most ubiquitous by-products of modern industrial society, without the concurrence of *either* political branch, let alone the delegation of such power from the legislature. Yet, it is for Congress and the executive, not the courts, to make the ultimate decisions as to how this nation, alone or in concert with others, will address the threat of climate change.

Article III standing is an essential component of the separation of powers. Among other things, the requirement of Article III standing ensures that exercises of judicial power are confined to "cases" or "controversies" that are fit for judicial resolution. In this case, petitioners cannot satisfy the essential requirements of Article III standing. First, they have failed to allege an injury-in-fact that is both actual or imminent as well as concrete and particularized. Indeed, as petitioners strain to demonstrate their alleged harms satisfy the first prong of the injury-in-fact requirement, they

undermine their ability to satisfy the other requisite half of that test. Further, petitioners' claims are not redressable. Therefore, petitioners do not have standing to advance their claims, and federal courts do not have jurisdiction to hear their claims.

Even were petitioners to have standing, their fundamental claim is without merit, as Congress has not delegated authority to the EPA to regulate emissions of greenhouse gases, whether from motor vehicles or any other source. Federal agencies possess no inherent powers. As all legislative powers of the federal government are vested in the Congress, agencies have only those powers expressly delegated them by the legislature.

The language, structure, history, and underlying logic of the Clean Air Act compel the conclusion that Congress has not delegated authority to the EPA to regulate greenhouse gases as such. This conclusion is confirmed by decades worth of congressional debates over what, if anything, should be done to address concerns about global climate change. If the United States is to adopt additional measures to address the threat of climate change, it must be with the concurrence of the legislature, not by judicial fiat.

ARGUMENT

I. PETITIONERS HAVE NOT SATISFIED THE REQUIREMENTS OF ARTICLE III STANDING

Separation of powers is an essential feature of the American constitutional system, and is necessary to the preservation of individual liberty. *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("The ultimate purpose of this separation of powers is to protect the liberty and security of the governed."); *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) ("The principle of separation of powers was not simply an abstract generalization in the minds of the

Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787."). The importance of separation of powers principles "transcends the convenience of the moment." *Clinton v. New York*, 524 U.S. 417, 449-50 (1998) (Kennedy, J., concurring). The seriousness of the harms alleged by the petitioners does not alter this principle. *See Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured . . . to provide avenues for the operation of checks on the exercise of governmental power."). *Cf. United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) ("It would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance . . . the political branches of the Government must fulfill this grave constitutional obligation if democratic liberty . . . [is] to endure.").

The Article III requirement of standing is an essential part of the separation of powers. *Allen v. Wright*, 468 U.S. 737, 752 (1984) ("the law of Article III standing is built on a single basic idea—the idea of separation of powers"). "To permit a complainant who has no concrete injury to require a court to rule" on important questions of national—or even international—importance "would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of . . . 'government by injunction.'" *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974). "[I]f the judicial power extended . . . to every question under the laws . . . of the United States," John Marshall warned, "[t]he division of power [among the branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary." 4 *Papers of John Marshall* 95 (C. Cullen ed.,

1984); *see also United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring) ("we risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens").

Petitioners have failed to meet their burden of establishing that even one claimant has standing under Article III. Standing requires that "the plaintiff must have suffered an 'injury in fact,'" that is "actual or imminent" and "concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In addition, the plaintiff must demonstrate that the alleged injury is "fairly traceable" to the conduct complained of and that "the injury will be redressed by a favorable decision." *Id.* (citation omitted). *See also Allen*, 468 U.S. at 751 ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."). Petitioners bear the burden of demonstrating that they have satisfied all three elements. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1861 n.3 (2006) ("because we presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record, . . . the party asserting federal jurisdiction . . . has the burden of establishing it") (citation omitted); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 104 (1998) (parties "invoking federal jurisdiction bear[] the burden of establishing its existence"). This is a burden they cannot meet. In the present case, petitioners have not suffered an "injury-in-fact," nor have they demonstrated that any alleged injury is redressable by a favorable decision.

A. Petitioners' Concerns About Global Warming Present Generalized Grievances Not Fit For Judicial Resolution

Courts lack jurisdiction to hear claims that consist of nothing more than "generalized grievance[s]" that are "common to all members of the public." *Richardson*, 418 U.S. at 176. Courts can only exercise jurisdiction over the claim if the plaintiff has "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *See Sierra Club v. Morton*, 405 U.S. 727, 731 (1972). As the Chief Justice has observed, "[b]y properly contenting itself with the decision of actual cases or controversies at the instance of someone suffering distinct and palpable injury, the judiciary leaves for the political branches the generalized grievances that are their responsibility under the Constitution." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1229 (1993). Indeed, it can be said that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quotation omitted).

The standing question is not merely whether a given claim can be heard, but whether the given litigants are the proper parties to bring a given claim. *Allen*, 468 U.S. at 752 ("the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."). "The 'core component' of the requirement that a litigant have standing to invoke the authority of a federal court 'is an essential and unchanging part of the case-or-controversy requirement of Article III.'" *Cuno*, 126 S. Ct. at 1861. A proper showing of standing is necessary, in part, because an exercise of the judicial power

"can so profoundly affect the lives, liberty, and property of those to whom it extends." *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 473 (1982). Without question, policy decisions concerning if, when, and how to address climate change will "profoundly affect the lives, liberty, and property" of all Americans, making such matters particularly unsuitable for resolution by this Court.

That climate change may be an urgent concern provides no argument for discarding the traditional requirements of standing. As this Court has noted before:

> It can be argued that if [petitioners are] not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.

Richardson, 418 U.S. at 179.

That an issue cannot be addressed in the Court does not mean it will not be addressed. "Lack of standing within the narrow confines of Article III jurisdiction does not impair the right to assert [their] views in the political forum or at the polls." *Id.* Indeed, the regularity with which climate change emerges in congressional debate, the increased relevance of environmental concerns in national political campaigns, and the rapid speed at which states have adopted various climate-related measures, *see generally* Barry G. Rabe, *Statehouse and Greenhouse: The Emerging Politics of American Climate Change Policy* (2004), amply demonstrate that the political process is fully capable of adopting climate policies if and when the public demands such action.

B. Petitioners Have Not Suffered Any Injury-in-Fact That Is *Both* Actual Or Imminent *And* Concrete And Particularized

Injury-in-fact is an essential component of Article III standing. The injury-in-fact requirement "ensures that the courts will more properly remain concerned with tasks that are, in Madison's words, 'of a Judiciary Nature,'" Roberts, *Article III Limits on Statutory Standing*, 42 Duke L.J. at 1232 (quoting James Madison, 2 *Records of the Federal Convention of 1787*, 430 (M. Farrand ed., 1966)). As John Marshall noted in *Marbury v. Madison*, "the province of the court is, solely, to decide on the rights of individuals," 5 U.S. (1 Cranch) 137, 170 (1803), not to vindicate the public interest in environmental protection or a suitably stable climate. *See Lujan*, 504 U.S. at 576-77.

In order to have standing, petitioners must allege an injury-in-fact that is *both* "actual or imminent" *and* "concrete and particularized." *Lujan*, 504 U.S. at 561; *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense"). The injuries petitioners allege cannot satisfy both prongs of the injury-in-fact requirement, if they can satisfy either. Insofar as petitioners allege harms that are "actual or imminent," the injuries are suffered by the public at large, and are too generalized to be the sort of individualized and particularized harm necessary for standing. The converse is also true. Insofar as petitioners have sought to allege specific harms that are particular to them, the injuries alleged are too remote and distant in time to satisfy the "actual or imminent" requirement.

To be "actual or imminent," the injury must be "palpable," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979), "certainly impending," *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979), or "real

and immediate." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Allegations of a far off injury at a much later date are too speculative to suffice. "Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Lujan*, 504 U.S. at 564 n.2 (quotations omitted); *id.* at 579 (Kennedy, J., concurring); *see also Whitmore*, 495 U.S. at 158 ("Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be 'certainly impending' to constitute injury in fact") (citations omitted); *Lyons*, 461 U.S. at 101-02 ("The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury.") (quotation omitted).

Insofar as litigants assert near-term effects—such as the minor perturbations in the climate that may have been detected, they are general, climatic effects that are not concrete and particularized to the petitioners. Insofar as petitioners allege current harm from changes in the global climate, they allege a grievance they "suffer[] in some indefinite way in common with people generally." *Frothingham v. Mellon*, 262 U.S. 447, 448 (1923). Current changes in the global climate are felt by all U.S. citizens—indeed by all citizens of the world. They are not particular to any one of the petitioners here, nor can they be. Such generalized grievances are insufficient to establish injury-in-fact. *See Cuno*, 126 S. Ct. at 1862.

Petitioners' reliance upon scientific evidence demonstrating an anthropogenic contribution to climate change is to no avail. Indeed, this Court need not question petitioners' presentation of the current state of climate science to conclude that petitioners lack standing. "The relevant showing for purposes of Article III standing . . . is not injury to the environment, but injury *to the plaintiff*."

Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 181 (2000) (emphasis added). Thus claims about current or projected climatic changes are not, by themselves, sufficient to confer standing upon the petitioners. Article III standing still requires that petitioners demonstrate "that the action injures [them] in a concrete and personal way." *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring). They must show that they, in particular, are among the injured—that the injuries are theirs, not simply a consequence of generalized impacts on the global climate as an undifferentiated whole.

Insofar the petitioners have sought to allege harms that are particular to them—specific, localized effects such as the Commonwealth of Massachusetts's fear of future property loss due to an eventual rise in sea levels over the next century, *see Massachusetts v. EPA*, 415 F.3d 50, 65 (D.C. Cir. 2005) (Tatel, J., dissenting)—the harms alleged are too remote in the future to satisfy the actual or imminent requirement. Even the best predictions of what may transpire in the earth's climate in the year 2050 or 2100 are too speculative and remote to fulfill the requirement that alleged injuries are "actual or imminent" "Allegations of possible future injury do not satisfy the requirements of Art. III." *Whitmore*, 495 U.S. at 158. Unlike claims of an immediate environmental impact, these allegations rely upon many variables, including but not limited to estimates of future greenhouse gas emissions, climatic feedback mechanisms, and other exogenous variables, that may change dramatically in the years to come. *See, e.g.*, National Academy of Sciences/National Research Council, *Climate Change Science: An Analysis of Some Key Questions* 2, 18 (2001) (noting that estimates of future warming and attendant consequences are sensitive to assumptions about a wide range of variables), J.A. at 152, 195. This makes the petitioners' claims too speculative to satisfy the injury requirement.

The potential seriousness of climate change does not obviate petitioners' obligation to demonstrate that they meet the requirements of Article III standing. The gravity of the harm alleged does not alter the analysis of injury. Even where the injury alleged is "one of the most serious injuries recognized in our legal system," this Court has recognized its obligation to ensure that the plaintiffs completely satisfy the requirements of Article III, as "the federal judiciary may not redress [any injury] unless standing requirements are met." *Allen*, 468 U.S. at 756-57.

If this Court has adhered to its constitutional obligations when grievous constitutional harms have been alleged, there is no basis for any less commitment to such principles here. Indeed, if "environmental concerns provide no reason to disregard limits in the statutory text," *Rapanos v. United States*, 126 S. Ct. 2208, 2247 (2006) (Kennedy, J. concurring in the judgment); *id.* at 2228 (plurality opinion of Scalia, J.), then such concerns clearly provide no reason to disregard the jurisdictional limitations imposed by Article III. *See also Whitmore*, 495 U.S. at 161 ("It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case."). Under well established standards for Article III standing, petitioners cannot establish that they have suffered an injury-in-fact.

C. Petitioners' Alleged Injuries Are Not Redressable By A Favorable Ruling From This Or Any Other Court

It is not enough to establish standing that a petitioner demonstrate an "injury-in-fact." In addition, petitioners "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751. As this Court explained in *Steel Co. v. Citizens for a Better Environment*, "[r]elief that does not remedy the injury

suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." 523 U.S. at 107. This, too, is a burden petitioners cannot meet.

The redressability of petitioners' alleged injuries depends upon claims that various third parties not subject to this litigation will take independent actions in coming years and decades to mitigate the harms they allege will result from climate change. Whereas in *Lujan* the redressability of the plaintiffs' claims depended upon the compliance of another agency within the federal government, here redressability is contingent upon the future actions of foreign governments, private firms, and the market for automotive technologies. Whether or not, as the dissent below contends, there is "a basis for concluding that other countries would come to mandate technology developed in response to U.S. regulation," *Massachusetts v. EPA*, 415 F.3d at 66 (Tatel, J., dissenting), the unconstrained, voluntary actions of third parties at some indefinite point in the future cannot serve to satisfy the redressability requirement of Article III. Such claims are "entirely conjectural." *Lujan*, 504 U.S. at 571. Petitioners' experts may have "no doubt" that foreign governments "would gradually be mandated by other countries around the world," Decl. of Michael P. Walsh ¶ 10, J.A. at 244. Nonetheless, whatever the likelihood of such future actions, they remain purely speculative for the purposes of satisfying the requirements of Article III. "This is precisely the sort of conjecture [this Court] may not entertain in assessing standing." *Cuno*, 126 S. Ct. at 1866.

The speculative nature of petitioners' claim is further demonstrated by the fact that even were petitioners able to demonstrate standing and establish that the EPA had the authority to regulate motor vehicle emissions of greenhouse gases, there is still no basis to conclude that a favorable court judgment would provide petitioners with any meaningful relief whatsoever. According to petitioners, the U.S.

transportation sector represented approximately 7 percent of global emissions during the 1990s. Decl. of M. MacCracken ¶ 30, J.A. at 238. Even assuming that the entirety of these emissions were subject to regulation by the EPA under Section 202 of the Clean Air Act, 42 U.S.C. § 7521, and that the EPA were to impose dramatic curbs on such emissions, this would not redress petitioners' alleged injuries in any meaningful respect. Indeed, even were the EPA to eliminate *all* greenhouse gas emissions from the U.S. transportation sector (which includes many sources of emissions beyond the passenger vehicles subject to regulation under Clean Air Act Section 202), this would not alleviate the harms petitioners allege they will suffer from climate change.

Dr. T.M.L. Wigley of the National Center for Atmospheric Research demonstrated that were all developed nations—those on "Annex B"—to fully comply with the greenhouse gas emission reduction targets established by the Kyoto Protocol, and maintain such controls through 2100, this would only change the predicted future warming by 0.15°C by 2100, and projections in sea-level rise would be modified by only 2.5 centimeters. T.M.L. Wigley, *The Kyoto Protocol: CO2, CH4 and Climate Implications*, 25 Geophysical Research Letters 2285 (1998). Yet, the reductions modeled in the Wigley study are several times greater than the complete elimination of all greenhouse gas emissions from the U.S. transportation sector, let alone any realistic estimate of emission reductions to be achieved from the imposition of regulatory controls over time, particularly given "the lead time needed to economically introduce changes into the motor vehicle fleet." Decl. of M. MacCracken ¶ 32, J.A. at 239.

D. The Alternative Theories Of Standing Put Forward By State *Amici* Are Equally Unavailing

State *amici* forward an additional basis for standing that is equally unavailing. Specifically, state *amici* claim that

states have standing because their efforts to address greenhouse gas emissions "could be and indeed have been challenged as preempted based on the EPA's decision" *not* to regulate. Brief of the States of Arizona, et al., in Support of Petitioners at 6. [2] State *amici* claim, in turn, that they are "harmed by the EPA's decision because it intrudes on their sovereignty by subjecting them to claims that they are prevented from regulating motor vehicle emissions as the CAA permits." *Id.* at 13. Contrary to state *amici*'s contentions, this is not a sufficient basis for standing.

States' vulnerability to claims of federal preemption is not only speculative, but is also wholly independent of the EPA's authority to regulate greenhouse gas emissions under Section 202(a) of the Clean Air Act, 42 U.S.C. § 7521(a). While some may claim that the EPA's lack of authority under Section 202(a) is a basis for preempting states from adopting emission standards of their own, states would remain subject to colorable preemption claims even were the EPA to assert the authority to regulate greenhouse gases under the Clean Air Act. Put simply, "[t]here is no amount of evidence that potentially could establish that [state *amici*'s] asserted future [preemption] injury is [either] 'real and immediate,'" *Whitmore*, 495 U.S. at 160, fairly traceable to the EPA's decision, or redressable.

First, state *amici* cannot demonstrate that the EPA's lack of authority to regulate vehicle emissions of greenhouse gases will lead to the preemption of state efforts to adopt such controls, as there are many alternative bases upon which courts could conclude that state regulation of

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[2] *See also id.* at 13 ("In particular, plaintiffs claim that if the EPA is without authority to regulate emissions of pollutants associated with climate change from motor vehicles, California likewise cannot regulate them. The EPA's decision therefore has and will continue to lead to the concrete claims of preemption against States with respect to their efforts to deal with emissions related to climate change.").

greenhouse gases is preempted. Not only may courts conclude that state efforts to regulate motor vehicle emissions of greenhouse gases are preempted by Section 209(a), 42 U.S.C. § 7543(a), irrespective of EPA's authority under the Clean Air Act, but other provisions of federal law, such as the Energy Policy Conservation Act, 49 U.S.C. §§ 32901-32919, may be sufficient to preempt state efforts. *See, e.g., id.* § 32919 (preempting state laws "related to fuel economy standards"). "It is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case." *Whitmore*, 495 U.S. at 159-60.

Even were this Court to conclude that EPA had the authority to regulate greenhouse gas emissions under Section 202(a) of the Clean Air Act, and EPA were to adopt such emission standards, there is no guarantee that the state *amici* would be free to adopt regulations governing the emission of greenhouse gases from motor vehicles. Among other things, Clean Air Act Section 209(a), 42 U.S.C. § 7543(a), prohibits states from adopting or attempting to enforce "any standard relating to the control of emissions from new motor vehicles" that are subject to regulation under Section 202. State efforts to regulate vehicular emissions would still be contingent upon the approval of a waiver for the state of California to adopt such regulations under Clean Air Act Section 209(b)(1), 42 U.S.C. § 7543(b)(1), *and* a determination that the ability of states other than California to adopt equivalent vehicle emission controls under Clean Air Act Section 177, 42 U.S.C. § 7507, extends to emissions that are not subject to regulation under the Clean Air Act's nonattainment provisions. Thus, states' ability to regulate automotive emissions would remain wholly speculative.

State *amici* argue that "because the EPA has refused to regulate emissions of pollutants associated with climate change from motor vehicles, California's standards are the only ones available to the States that desire to regulate such

emissions." Brief of the States of Arizona, et al., in Support of Petitioners at 19. Yet this would be equally true were the EPA to regulate greenhouse gas emissions from motor vehicles. Under the Clean Air Act, states' only options with regard to the regulation of motor vehicle tailpipe emissions are to either accept existing federal standards or to adopt relevant standards adopted by the state of California. *See* 42 U.S.C. § 7507. This remains so irrespective of whether EPA has or exercises the authority to regulate tailpipe emissions of greenhouse gases.

Therefore, even assuming the claims of state *amici* describe an injury, the injury is neither fairly traceable to the EPA's alleged failure to regulate greenhouse gas emissions, nor can it satisfy the requirement of redressability. In either case, the arguments raised by state *amici* are too speculative to satisfy the requirements of Article III standing.

II. CONGRESS DID NOT DELEGATE AUTHORITY TO REGULATE GREENHOUSE GAS EMISSIONS TO THE EPA

Article I of the Constitution vests all legislative power in the Congress. "All legislative power herein granted shall be vested in a Congress . . ." U.S. Const. art. I, § 1. The EPA, like all federal agencies, has no inherent powers. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Before the EPA may impose rules on private individuals to control greenhouse gas emissions, Congress must make the decision that such rules are necessary and either enact such rules directly, or delegate such authority to the EPA with an "intelligible principle" to guide the agency's actions.

By ensuring that administrative agencies only exercise those powers delegated to them by the people's representatives, the delegation doctrine fosters democratic

accountability and safeguards liberty. "The delegation doctrine [was] developed to prevent Congress from forsaking its duties," *Loving v. United States*, 517 U.S. 748, 757 (1996), such as developing national climate change policy after legislative debate and in concert with the executive.

While this Court has been reluctant to apply the delegation doctrine with any force, it has consistently reaffirmed the bedrock constitutional notion that agencies have only those powers delegated to them by Congress. The Court has also interpreted statutes so as to avoid potential delegation problems, *see, e.g. Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 646 (1980), *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974), or required the agency to construe a statute so as to avoid delegation concerns. *See AT&T Corp. v. Iowa Public Utilities Bd.*, 525 U.S. 366, 388-89 (1999). *See also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673 (1997); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000).

Here the delegation doctrine serves as a background principle that requires the legislature and the executive, rather than unelected administrative agencies or the courts, to make policy decisions of national or global significance. The delegation doctrine ensures that "important choices of social policy are made by Congress, the branch of our Government most responsible to the popular will." *Industrial Union Dep't*, 448 U.S. at 685 (Rehnquist, J., concurring). As history demonstrates, the Framers believed that momentous policy choices should be made by the people's representatives. *See Ludecke v. Watkins*, 335 U.S. 160 (1948); *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388-89 (1813); Thomas Jefferson, *Jefferson's Notes on the State of Virginia*, Query XIII 173 (Merrill D. Peterson ed., 1975) ("Our ancient laws expressly declare,

that those who are but delegates themselves shall not delegate to others powers which require judgment and integrity in their exercise"). *See generally* David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993); Marci A. Hamilton, *Representation and Non-Delegation: Back to Basics*, 20 Cardozo L. Rev. 807 (1999). Indeed, "the most significant development in the law over the past thousand years is the principle that laws should be made not by a ruler or his ministers, or his appointed judges, but by representatives of the people." Antonin Scalia, *How Democracy Swept the World*, Wall St. J., Sept. 7, 1999, at A24.

When the Food and Drug Administration (FDA) sought to extend its regulatory authority to tobacco products, this Court found "reason to hesitate before concluding that Congress has intended such an implicit delegation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). The same caution is warranted here. Indeed, this presents more of an "extraordinary case" than did *FDA v. Brown & Williamson*, as it involves more than "assert[ing] jurisdiction to regulate an industry constituting a significant portion of the American economy." *Id.* at 159. Rather, this litigation seeks steps toward regulating American industry as a whole, not just emissions from motor vehicles. Greenhouse gases are the most ubiquitous by-product of modern industrial society, and the rationales petitioners have put forward to justify regulation under Section 202 of the Clean Air Act could well justify the regulation of other sources of greenhouse gases under other portions of the Act.

It is one thing to accept Congress's explicit decisions to engage in broad delegations of quasi-legislative authority to administrative agencies, as this Court has done. It is quite another to conjure a delegation of awesome regulatory authority from statutory provisions that were never intended

to be used for this purpose. Regulatory tools are delegated to agencies with specific language for specific purposes. *See* Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 14 (1983) ("the universe of each agency is limited by the legislative specifications contained in its organic act."). Once granted, these tools are not free-ranging objects to be wielded as agencies, courts, or private litigants would like.

Under this Court's precedents, Congress clearly has the power to delegate responsibility to the EPA for the regulation of greenhouse gases, provided it articulates an "intelligible principle" to guide the EPA's hand, just as it has delegated responsibility for the regulation of ambient air pollutants, hazardous air pollutants, and ozone-depleting substances under the Clean Air Act. Yet Congress has not done so. Until such time as the legislature makes such an express delegation of authority, the EPA is without such power—irrespective of what interpretation various political administrations place on the existing language of the Clean Air Act. The decision whether to adopt controls on the emissions of greenhouse gases, whether from automobiles or any other source, is "quintessentially one of legislative policy," *Industrial Union Dep't*, 448 U.S. at 685 (Rehnquist, J., concurring), and therefore one that must be made by the legislature. "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 866 (1984).

Congress cannot be presumed to have delegated the discretionary authority to regulate the most ubiquitous by-product of modern industrial society through provisions clearly designed to address environmental problems of a different sort. As this court has observed, "we must be guided to a degree of common sense as to the manner in

which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Brown & Williamson*, 529 U.S. at 133. Given the significance of climate change, and the unprecedented nature of the regulation petitioners seek, it is dubious that Congress would have sought to impose controls on greenhouse gas emissions in so indirect a fashion as alleged here. *See* John Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 276-77 ("If Congress has addressed a subject, but has done so in a limited way, this fact itself may suggest that Congress has gone as far as it could, as far as the enacting coalition wished to, on the subject in question.").

Congress has repeatedly addressed climate change since 1978 without once giving any indication that it had delegated regulatory authority to the EPA over greenhouse gases. *See* National Climate Program Act of 1978, Pub. L. No. 95-367, 92 Stat. 601 (1978) ("an Act to establish a comprehensive and coordinated national climate policy and program"). Congress gave due consideration to concerns about climate change during the years preceding the 1990 Clean Air Act Amendments. The 1990 Amendments included a new subsection on ozone depletion and several provisions encouraging "non-regulatory" approaches to greenhouse gas emissions. Indeed, Congress considered and rejected an explicit proposal to regulate greenhouse gases. The amendments initially approved by the Senate Committee on Environment and Public Works included limits on automobile tailpipe emissions of carbon dioxide, yet this language was stricken before passage due to staunch opposition on many fronts. *See Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52922, 59926-27 (Sept. 8, 2003). In the end, Congress told the EPA to study greenhouse gas emissions, not to regulate them. As summarized by one of the leading authorities on the Clean Air Act:

> EPA does not have any clear authority to regulate GHGs [greenhouse gases]. Given the extent of the congressional efforts to address the issues concerning GHGs and the absence of a credible mandate, there is little support for a claim that EPA has some latent power and obligation under the CAA to regulate these emissions.

Arnold W. Reitze, Jr., *Air Pollution Control Law: Compliance & Enforcement* 427 (2001).

Were this history not enough, several times since 1990 Congress has rejected the authorization of regulatory controls on greenhouse gases. In 1995, the Senate unanimously approved the so-called Byrd-Hagel resolution rejecting the Kyoto Protocol and stating that the U.S. will not act to control greenhouse gas emissions unless and until the rest of the world is willing to follow suit, S. 98, 105th Cong. (1997), and subsequently adopted numerous appropriations riders to prohibit the EPA from taking actions to implement the Protocol. *See* Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998); Pub. L. No. 106-74, 113 Stat. 1047, 1080 (1999); Pub. L. No. 106-377, 114 Stat. 1441, 1441A-41 (2000). Just last year, the Senate passed the so-called Bingaman-Domenici Resolution calling upon Congress to adopt measures to limit emissions of greenhouse gases. *See* 151 Cong. Rec. S7033 (June 22, 2005). If Congress had already delegated authority to regulate greenhouse gases to the EPA, such resolutions would be wholly unnecessary.

That the relevant provisions of the Clean Air Act are so poorly suited to the control of greenhouse gases is further evidence that Congress has not delegated such authority to the EPA, let alone provided an "intelligible principle" for the exercise of such authority. The clear intent of the Act when first enacted in 1967 and as subsequently amended in 1970, 1977, and 1990, is to control local and regional air pollution, such as soot and smog, not emissions such as carbon dioxide

that disperse throughout the global atmosphere. Indeed, the "heart" of the Act, as this Court has observed, is the set of provisions governing the creation and attainment of National Ambient Air Quality Standards (NAAQS) that localities are required to meet. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 66 (1975). Under these provisions, states are required to develop implementation plans to ensure that all metropolitan areas meet the NAAQS. The goal is to ensure that the ambient air in every county meets a minimum threshold, and the structure is premised on the notion that each region is capable of enacting measures that will enable the air quality standard to be met. This framework is wholly incompatible with the regulation of greenhouse gases, for which measurements of local, ambient concentrations are meaningless. Yet, it is provisions designed to address this central concern of the Act and help states comply with the NAAQS such as Section 202(a), 42 U.S.C. § 7521(a), that petitioners now seek to invoke against climate change. *See* Reitze, *Air Pollution Control Law*, *supra*, at 419-21 (2001) (detailing history and purpose of Clean Air Act Section 202 and concluding that such history "does not support the use of §202(a)" for control of greenhouse gas emissions).

This Court has "refused to find implicit in ambiguous sections of the CAA" the authorization for regulatory actions that would typically be explicit. *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 467 (2001). "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Id.* at 468. The authority to regulate greenhouse gases—ubiquitous gases that are inevitably produced by the combustion of fossil fuels—is among the greatest regulatory undertakings ever contemplated in environmental law. *See Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52922, 59928 (Sept. 8, 2003) ("It is hard to imagine any issue in the environmental area having

greater 'economic and political significance' than regulation of activities that might lead to global climate change."). As such, it is quite a large "elephant."

It is simply implausible that Congress would leave such a mammoth issue unaddressed in the text of the Clean Air Act, despite countless debates over climate change policy, had Congress sought to confer such regulatory authority to the EPA. *Brown & Williamson*, 529 U.S. at 160 ("We are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."). As then-Judge Breyer observed, "Congress is more likely to have focused upon, and answered, major questions," such as whether to regulate an entire class of omnipresent emissions, while "leaving interstitial matters" for resolution by the agency during the "daily administration" of the statute. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986).

CONCLUSION

Petitioners seek to drag courts into a complex and contentious policy question at the intersection of economics, environmental protection, international diplomacy, and distributive justice. This is an invitation this Court should not accept. If this nation is to adopt momentous measures to address the threat of climate change, that is a decision that must be made in the halls of Congress, and perhaps in the negotiation sessions of international conferences among states, not in this Court.

Respectfully submitted.

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